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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DEBORAH RHETT,

Petitioner,

v.

CARNEGIE CENTER ASSOCIATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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129 pp

QUESTIONS PRESENTED

1. Does a company that allows an employee to take an unpaid pregnancy leave, but then abolishes her job as part of a reduction-in-force solely on the ground of her being on leave from the workplace, violate Title VII and the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), which defines discrimination "on the basis of sex" to include discrimination "on the basis of pregnancy, childbirth, or related medical conditions"?

2. Does an employer's admission that in carrying out a reduction-in-force, it terminated an employee while she was on pregnancy leave because of her absence from the workplace, constitute "direct evidence" of discrimination on the basis of pregnancy and because of sex under the principles of *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985)?

3. Under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) line of decisions, after a plaintiff challenging her employer's decision to terminate her while she was on pregnancy leave establishes a *prima facie* case, does an employer satisfy the requirement that it articulate a "legitimate, nondiscriminatory reason" for that decision by asserting that the plaintiff was fired because of her absence from the workplace on that leave?

4. Under the *McDonnell Douglas Corp. v. Green* line of decisions, is proof of "pretext" in a pregnancy discrimination case limited to a showing that the employer treated the plaintiff differently than non-pregnant employees on disability leave?

PARTIES

The parties are all shown in the caption. Respondent is not a publicly held corporation but is a partnership.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Deborah Rhett respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit entered in this proceeding on December 30, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 129 F.3d 290 and is set out at pages 1a-47a of the Appendix hereto ("App."). The Opinion of the United States District Court for the District of New Jersey is unreported and is set out at pages 48a-77a of the Appendix. The Opinion of the Bankruptcy Court for the District of New Jersey is unreported and is set out at pages 78a-92a of the Appendix. The Order of the Court of Appeals denying petitioner's timely Petition for Rehearing and denying, by an equally divided court, the suggestion for rehearing *en*

banc, is unreported and is set out at pages 93a-94a of the Appendix. The Judgment of the Court of Appeals, issued in lieu of a mandate, and dated December 30, 1997, is set out at pages 95a-96a of the Appendix.

JURISDICTION

The opinion of the Third Circuit was entered October 31, 1997. Petitioner filed a timely petition for rehearing and suggestion for rehearing *en banc*, which was denied on December 22, 1997. (App. 95a-96a.) Justice Souter, as Circuit Justice, granted petitioner's motion to extend the time for filing the petition for a writ of certiorari to and including April 21, 1997. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k),[1] which provides in pertinent part:

> The terms "because of sex" or "on the basis of sex" include. but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) shall be interpreted to permit otherwise.

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[1]July 2, 1964, P.L. 88-352, Title VII, § 701, 78 Stat. 253; Oct. 31, 1978, P.L. 95-555, § 1, 92 Stat. 2076.

STATEMENT OF THE CASE

A. Proceedings Below.

Petitioner Deborah Rhett filed an action on November 26, 1993, in the United States District Court for the District of New Jersey under Title VII of the Civil Rights Act of 1964, as amended, and the New Jersey Law Against Discrimination against her former employer, respondent Carnegie Center Associates (hereinafter "Carnegie").[2] The complaint alleged discrimination on the basis of her gender, race, and marital status when petitioner was terminated from her employment during a reduction in force at the company.

Because Carnegie was then undergoing bankruptcy reorganization, the Title VII action was automatically stayed and petitioner pursued the matter by filing a proof of claim with the bankruptcy court on February 19, 1994. The district court terminated the Title VII action without prejudice and the case continued in the bankruptcy court. The bankruptcy court held a three-day bench trial and found in Carnegie's favor. (App. 78a-92a.)

The district court affirmed the decision of the bankruptcy court. (App. 48a-77a.) Petitioner appealed to the Court of Appeals for the Third Circuit, which affirmed the decision of the district court by a divided vote. (App. 1a-47a.) Petitioner timely sought rehearing and rehearing *en banc*, which were denied, with the suggestion for rehearing *en banc* being denied by an equally divided court. (App. 93a-94a.)

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[2]The complaint also alleged jurisdiction pursuant to 42 U.S.C. § 1981 with regard to petitioner's claims of racial discrimination. Those claims are not at issue in this proceeding.

B. Statement of Facts.[3]

Petitioner was initially employed by respondent Carnegie in April, 1989, and became a full-time permanent secretary in Carnegie's Accounting/Finance Department on July 17, 1989. She received a salary increase of $1,500 in January, 1990, based on her satisfactory performance. (App. 2a, 80a.)

In June, 1990, petitioner informed her supervisors and co-workers that she was pregnant. (App. 2a, 82a.) On December 18, 1990, she circulated a memorandum to managerial officers (including Carnegie's owner, Alan Landis, its controller, Keith Gormisky, and the chief financial officer and counsel, Gary Turndorf), stating that she planned to be on maternity leave from December 21, 1990, until about April 15, 1991. (App. 21-31, 83a.) Carnegie hired a temporary secretary, whom petitioner trained prior to starting her leave, to fill in while she was gone.

Carnegie did not have a written maternity leave policy, but Turndorf testified that its practice was to "try to hold it open for them if we could" so that "[w]hen they wanted to come back, if they contacted us and there was something open that was suitable, we would offer it to them." (App. 3a, 82a.) During Rhett's absence (until her termination), Carnegie continued her medical coverage (App. 3a n.1, 8a, 85a), and its records indicated that she was still an employee of the corporation. (App. 3a n.1.)[4]

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[3]We here set forth only the facts relevant to the issues raised in this Petition.

[4]While the bankruptcy court and the district court viewed petitioner as "not working for the company" once her pregnancy leave had started (App. 70a, 92a), the court of appeals did not affirm their judgments on this ground. Instead, the panel noted, "it appears that

Carnegie was experiencing financial difficulties before petitioner took her maternity leave, and these difficulties worsened while she was out on leave. The company was forced to make staff cutbacks to decrease costs and eliminated several positions just before petitioner was scheduled to return to work. Specifically, Carnegie decided to reduce the number of secretarial positions, and Gormisky wrote petitioner on March 26, 1991, to tell her that her position had been eliminated.[5] This was the first indication to petitioner that she would not be able to return to work after her pregnancy leave. (App. 84a ¶¶ 32, 33.)

Turndorf testified that Carnegie did not make a performance-based evaluation as to which secretaries should be retained to fill the remaining number of positions within the company (App. 3a; *see also supra* note 5) but rather did not consider petitioner to be an employee of the corporation once she took leave, so that petitioner was not "let go" when Gormisky wrote to her on March 26, 1991. (App. 70a (quoting trial testimony).)

Petitioner remained "under medical care" at the time Gormisky sent her the notice that her position was

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Rhett was an employee of Carnegie on an unpaid leave of absence" at the time of her termination. (App. 8a.)

[5]The bankruptcy court suggested that prior to abolition of Rhett's job there had been five secretarial slots. (App. 89a.) The court of appeals described the reduction as "from four to three." (App. 4a.) The difference is unimportant to the disposition of this case because it is undisputed that the secretarial positions were interchangeable (*see* App. 80a ¶ 7) and that Rhett's job was not eliminated because the position was uniquely unnecessary or because her qualifications were adjudged inferior to those of other incumbent secretaries — but simply because "she was not working for the company at the time" she was on leave. (App. 3a-4a, 92a.)

being abolished. (App. 4a, 8a.) However, after she received that letter, petitioner asked about two other positions with Carnegie and was told that they were not available to her. Carnegie did not interview petitioner or consider hiring her for any other position. (App. 4a.)

C. The Bankruptcy Court's Ruling.

The bankruptcy court rejected petitioner's Title VII claim. In its view, petitioner had failed to establish a *prima facie* case since her employment ended when she "left to have a baby" and she "had no absolute right to keep her job." (App. 88a.) Even assuming the existence of a *prima facie* case, the bankruptcy judge concluded that petitioner's claim failed because she could not establish that Carnegie's reduction in force was pretextual: "the uncontradicted testimony of the debtor establishes that the debtor had to let someone in the secretarial group go and the fact that Rhett was not working for the company at the time made it logical that she be the one." (App. 92a.)

D. The District Court's Decision.

The district court affirmed the bankruptcy court's determination. It agreed that petitioner had not established a *prima facie* case because:

(1) Carnegie had no leave policy but only an "informal [practice of rehiring] . . . individuals [on maternity leave] if the circumstances at the time of the employee's return warranted doing so" (App. 67a);

(2) Carnegie "did not consider [petitioner] to be an employee there on March 26, 1991 when Gormisky notified her that C[arnegie] abolished her position" (App. 70a); and

(3) the bankruptcy court's finding that "the secretarial position held by appellant was abolished for legitimate, non-discriminatory reasons" (Carnegie's "severe financial difficulties") was "not clearly erroneous" (App. 73a).

E. The Decision of the Court of Appeals.

As previously indicated, the court of appeals concluded that petitioner remained "an employee of Carnegie on an unpaid leave of absence" until March 26, 1991. (App. 8a.) Accordingly, the court of appeals framed the issue on appeal as "whether an employee's absence on maternity leave can be a legitimate non-discriminatory reason for her termination." (App. 5a.)[6]

The court recognized that "Carnegie terminated an employee who had performed satisfactorily solely because of an economically justified reduction in force while she was away on maternity leave." (App. 11a.) In addition, "Carnegie had need after Rhett was gone for an employee to do the type of work she did before it eliminated her position" (App. 12a), and "fired Rhett because she was on leave rather than . . . [deciding] which secretary's position to abolish on the basis of seniority or merit . . . ." (App. 14a.)

Nevertheless, a majority of the court of appeals panel held that Carnegie's action in selecting petitioner for termination did not *directly* violate the Pregnancy

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[6]The court of appeals held that "the bankruptcy and district courts erred in finding that Rhett did not make out a *prima facie* case of pregnancy discrimination" but ruled that "the error was harmless [because] Carnegie asserted a legitimate non-discriminatory reason for Rhett's termination, that she was away on leave [and] Rhett has not satisfied her burden of showing that this reason was pretextual." (App. 14a-15a.)

Discrimination Act (PDA) because "the mere consideration of an employee's absence on maternity leave is [not] a *per se* violation of the PDA." (App. 7a n.3, 13a.)

Even though petitioner's absence from the workplace while on leave was caused by "pregnancy or related medical conditions," the court ruled that petitioner could obtain relief only by "showing that Carnegie treated her differently than it would have treated a non-pregnant employee absent on disability leave." (App. 13a.)

> We acknowledge that arguably it was unfair for Carnegie to fire Rhett because she was on leave rather than to decide which secretary's position to abolish on the basis of seniority or merit, but it was not illegal for it to do so unless it would not have eliminated the position of another employee on disability leave who was not pregnant.

(App. 14a.) At the same time, the panel majority conceded that such a showing "was difficult . . . because Carnegie never has had an employee on disability leave for a protracted period for a reason other than pregnancy." (App. 13a.)

Judge McKee dissented at length on the ground that, because petitioner's absence was due solely to her pregnancy, it was illegal sex discrimination to select her for termination because of that absence. (App. 19a-47a.)

> Pregnancy and absence are not, however, analytically distinct, and an employer can not punish for the absence occasioned by pregnancy under Title VII. As noted above, that statute states that it is an unlawful employment practice to "discharge any individual . . . or otherwise discriminate . . . because of sex," 42 U.S.C. §2000e-2(a)(1), and, after the PDA, that includes

> discrimination "on the basis of pregnancy . . . or related medical conditions." 42 U.S.C. §2000e(k). That protection is meaningless unless it is intended to extend to the "temporary" absence from employment that is unavoidable in most pregnancies. Thus, the absence endemic to pregnancy, unlike factors that may sometimes be a proxy for age, has to be protected under the facts of this case.

(App. 38a.) In Judge McKee's view, "Carnegie's action [wa]s the functional equivalent of terminating Rhett because she was pregnant," just as the Second Circuit held in *Teahan v. Metro-North Commuter R.R. Co.*, 951 F.2d 511 (2d Cir. 1991), *cert. denied*, 506 U.S. 815 (1992) that "'an employer "relies" on a handicap when it justifies [its employment decision] based on conduct caused by that handicap.'" (App. 44a-45a.) For that reason, Judge McKee would have "remanded for a determination of whether Rhett would have been selected for termination based upon factors other than her absence." (App. 47a.)

As noted above, the judges of the Third Circuit were equally divided, by a 6-6 vote, as to whether to grant rehearing *en banc* on this issue.[7]

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[7]Judge Wellford, of the Sixth Circuit, sat by designation on the panel and was the deciding vote to affirm the lower courts' decisions. He did not participate in the vote whether to grant rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE AN IMPORTANT QUESTION AS TO THE MEANING OF THE PREGNANCY DISCRIMINATION ACT CONCERNING WHICH THE CIRCUITS ARE IN CONFLICT

This case presents an important question as to the correct interpretation of the Pregnancy Discrimination Act that should be resolved by this Court. The decision below is based on a narrow reading of the statute that makes its first clause meaningless and surplus.

The court of appeals recognized that Title VII bars "employment discrimination based on an individual employee's sex" and that the Pregnancy Discrimination Act amended Title VII so that "[t]here is employment discrimination whenever an employee's pregnancy is a motivating factor for the employer's adverse employment decision." (App. 6a.) Yet in essence, the court of appeals held that a pregnant woman's absence from work, even though indisputably because of her pregnancy and a related medical condition, constituted a "legitimate, nondiscriminatory reason" for choosing her to be terminated while retaining non-pregnant employees in positions interchangeable with hers. The court thus drew a distinction between "pregnancy" and absence resulting directly from pregnancy, establishing that distinction as the line between permitted conduct and prohibited discrimination.

Having found that the employer had advanced a "legitimate, nondiscriminatory reason" that met its burden under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the court below further held that the *only* way that petitioner could show pretext was

to demonstrate that other employees were absent because of disability at the time of a reduction in force at the company but were not terminated.

By these holdings, the court of appeals collapsed the two clauses of the PDA, and rendered the first meaningless. The first clause of the statute (see *supra* p. 2) provides that discrimination "because of sex" shall include discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." The second clause, separated by a semi-colon, provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." The plain meaning of the first clause is that the discriminatory treatment of a woman because of her pregnancy constitutes discrimination based on sex in violation of the statute.

This Court and individual Justices have recognized the broad sweep of the first clause:

> [T]he first clause of the PDA reflects Congress' disapproval of the reasoning in *Gilbert* [citation omitted]. Rather than imposing a limitation on the remedial purpose of the PDA, we believe that the second clause was intended to overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied.

California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 284-85 (1987). "The meaning of the first clause is not limited by the specific language in the second clause, which explains the application of the general principle to women employees." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 688 (1983) (Rehnquist, J., dissenting). In contrast to this

Court's understanding of the statutory structure, decisions of the lower courts exhibit great confusion.[8]

In the present case, petitioner Rhett was absent from work solely because of her pregnancy and a related medical condition; to terminate her because of her absence was to terminate her because of her pregnancy, a violation of the statute on its face.

The contrary conclusion of the court below brings to mind Justice Frankfurter's observation, in a different context, that the Fourteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination," *Lane v. Wilson*, 307 U.S. 268, 275 (1939). This Court has consistently eschewed an unduly literal or mechanical interpretation of Title VII's proscription of discriminatory treatment. *E.g.*, *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 188-89 (1991) ("In its use of the words 'capable of bearing children' in the 1982 policy statement as the criterion for exclusion, Johnson Controls explicitly classifies on the basis of potential for pregnancy. Under the PDA, such a

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[8]*Compare, e.g., Maganuco v. Leyden Community High School Dist. 212*, 939 F.2d 440, 444 (7th Cir. 1991) (PDA's "scope is limited to policies which impact or treat medical conditions relating to pregnancy and childbirth less favorably than other disabilities"); *Crnokrak v. Evangelical Health Systems Corp.*, 819 F. Supp. 737, 741 (N.D. Ill. 1993) (suggesting that two clauses of statute generate "seemingly irreconcilable interpretations"); *with, e.g., Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996) (second clause "provide[s] additional protection to those 'women affected by pregnancy, childbirth or related medical conditions'"); *Smith v. F.W. Morse & Co., Inc.*, 76 F.3d 413, 424 (1st Cir. 1996) (reading PDA to protect employees from discharge because of "short-term inability to work [that] is bound up with the very nature of pregnancy and childbirth," and to allow "an employer [to] discharge an employee while she is on a pregnancy-induced leave so long as it does so for legitimate reasons unrelated to her gravidity").

classification must be regarded, for Title VII purposes, in the same light as explicit sex discrimination"); *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 7809 (1978) ("Actuarial studies could unquestionably identify differences in life expectancy based on race or national origin, as well as sex. But a statute that was designed to make race irrelevant in the employment market, *see Griggs v. Duke Power Co.*, 401 U.S. 424, 436, could not reasonably be construed to permit a take-home pay differential based on a racial classification") (footnotes omitted).

The court below interpreted the PDA to make illegal only a policy or practice of treating a pregnant woman differently from a non-pregnant but otherwise disabled employee. Such disparate treatment obviously falls within the plain language of the second clause but hardly can be said to delimit the scope of *either* clause.[9]

Whether the PDA should be interpreted narrowly, as did the Third Circuit, or broadly to cover employment decisions that are based on conditions, such as absences from the job site, that are inherent in pregnancy is a question of great importance. A narrow interpretation will mean that during the absences that inevitably occur during every pregnancy, women will be subject to being terminated or otherwise adversely affected because they

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[9]The court of appeals read the second clause more narrowly that its language requires. The statute is not limited, in its terms, to a comparison to other employees suffering a disability. Rather, it encompasses treatment different from that accorded *any* "other persons not so affected [by pregnancy] but similar in their ability or inability to work." Here, petitioner contends, the proper comparison group includes the other incumbents of the secretarial positions interchangeable with hers, each of whom was not "affected" by pregnancy at the time of the reduction in force, but each of whom was (unlike petitioner) kept on as an employee.

are absent.[10] The only circumstances in which they can be protected from discrimination caused by effects of pregnancy will be in the rare instances in which an employer can be shown not to subject employees who are given leave for other reasons to adverse treatment.

The courts of appeals are in conflict over the question whether an adverse employment decision may legally be based on some action or behavior by an employee that is inextricably connected to a characteristic or condition protected by an anti-discrimination statute. In the present case, the sole basis articulated by Carnegie for terminating petitioner was her absence from the workplace due to her pregnancy and the unpaid leave

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[10]As the majority of the court below noted, the Family and Medical Leave Act (FMLA) requires employers (as that term is defined in the statute) to grant leave (which may be unpaid leave) to employees for medical conditions or childbirth and, except for certain highly compensated employees, to restore employees who have taken such leave to the same or an equivalent position upon their return to work. 29 U.S.C. §§ 2612(a)(1)(A), (D), 2612(c), 2614(a), (b). The FMLA has no impact upon this case. Rhett's termination preceded its enactment in 1993 and the statute did not take effect until that year, *see* Pub. L. No. 103-3, § 405, 107 Stat. 6, 26 (1993). Moreover, as the court below recognized (App. 19a n.5), the law excludes companies with fewer than 50 employees from its definition of "employer," 29 U.S.C. § 2611(4), and Carnegie has fewer than 50 employees.

Notwithstanding enactment of the FMLA, PDA protections against discrimination based on pregnancy continue to be of critical importance to large numbers of individual workers. In 1994, the Bureau of the Census reported that there were more than 25.3 million individuals in the United States employed by firms that had less than 20 employees in all, out of a total of more than 96 million workers. (Census statistics do not distinguish among firms employing more than 20 but less than 100 workers.) ECONOMICS AND STATISTICS ADMIN., BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1997, at 544 (Table No. 844) (1997).

which (in the view taken by the court below) she was granted. The court below held that despite the connection between petitioner's pregnancy and that leave, the company had advanced a nondiscriminatory reason for discharging her. *Compare, e.g.*, 3 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 47.07[3] at 47-51 (2d ed. 1995) ("Some leave accompanying childbirth is a necessity, and a policy of denying it, with discharge as the alternative, is tantamount to a policy of outright discharge for pregnancy").

The Third Circuit followed the interpretation of the PDA by the Seventh Circuit in *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994), which held that a pregnant employee could be discharged because of repeated instances of tardiness, even though the tardiness was caused by her pregnancy. (App. at pp. 9a-10a.) The First Circuit, on the other hand, would have come to a contrary result. Both the majority and the dissent below recognized the inconsistency between *Troupe* and *Smith v. F.W. Morse & Co.*, 76 F.3d 413 (1st Cir. 1996). The First Circuit interpreted the PDA as requiring that "an employer must put an employee's pregnancy (*including her departure on maternity leave*) to one side in making its employment decisions." 76 F.3d at 424, quoted at App. p. 10a and 42a (emphasis added by the court below).[11]

As the dissent below also noted, the decisions in this case and in *Troupe* are also in conflict with decisions of the Second Circuit interpreting the Rehabilitation Act of 1973, 29 U.S.C. § 794. (App. at pp. 43a-47a) In

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[11]In *Smith* the First Circuit held that the elimination of the plaintiff's job during a reorganization did not violate the PDA because the employer did not take the action because the plaintiff was absent, but for reasons unrelated to her pregnancy, *i.e.*, her position was unique.

Teahan v. Metro-North Commuter R.R. Co., 951 F.2d 511 (2d Cir. 1991), *cert. denied*, 506 U.S. 815 (1992), the Second Circuit held that it violated the Act for an employer to fire an employee because of absenteeism that resulted from a handicap. Similarly, in *Cushing v. Moore*, 970 F.2d 1103, 1108 (2d Cir. 1992), the Second Circuit reiterated the rule that if "an employee's conduct (such as absenteeism), which forms the articulated basis for a job termination is actually caused by a handicap," then there is a violation of the Rehabilitation Act.

The importance of the issue presented by this case is vividly demonstrated by the 6-6 vote by the Third Circuit over whether to grant rehearing *en banc*. This Court has granted certiorari on a number of occasions where there has been a split among the judges in a circuit and the case involves an important issue unresolved by this Court. *See Oil Workers Union v. Mobil Oil Corp.*, 426 U.S. 407, 412 (1976) (reviewing an 8-6 *en banc* decision); *Miree v. DeKalb County*, 433 U.S. 25 (1977); (reviewing an 8-6 *en banc* decision); *Rinaldi v. United States*, 434 U.S. 22 (1977) (reviewing a 7-6 *en banc* decision). As Chief Justice Rehnquist has stated:

> The sharp split amongst the judges who considered this case below demonstrates that our past precedents do not conclusively address the issues central to this dispute. In the same manner that we expect considered and deliberate treatment by these courts, we have a concomitant responsibility to aid them where confusion or uncertainty in the law prevails.

Ratchford v. Gay Lib, 434 U.S. 1080, 1082 (1978) (Rehnquist, J., dissenting.) This is particularly true when the case involves a recurring and important issue or where there is "widespread conflict among the circuits." *Commissioner v. Estate of Bosch*, 387 U.S. 456, 457 (1967).

II.

THIS CASE PRESENTS IMPORTANT ISSUES CONCERNING THE ALLOCATION OF EVIDENTIARY BURDENS UNDER *THURSTON* AND *MCDONNELL DOUGLAS/BURDINE* IN EMPLOYMENT DISCRIMINATION CASES

As discussed above, the central issue in this case is whether the termination of an employee because of conduct (here, absence from work) caused by pregnancy or some other protected characteristic, violates federal anti-discrimination laws, specifically Title VII of the Civil Rights Act of 1964 as amended by the Pregnancy Discrimination Act. The decision of the court of appeals that there was no violation in these circumstances infected its resolution of the remaining evidentiary issues in the case and resulted in the application by the court of incorrect evidentiary rules that conflict with this Court's decisions in *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985), *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). This case therefore raises important issues involving the allocation of the burden of proof in actions brought under Title VII and other federal anti-discrimination statutes.

1. Petitioner argued below that the elimination of her position because she was absent from the workplace due to her pregnancy and childbirth was a direct violation of the PDA, since absence from work is unavoidably connected with the condition of pregnancy. She maintained that, for this reason, the case should have been analyzed and decided under the rule of *Thurston*, rather than according to the *McDonnell Douglas/Burdine* approach. The court of appeals, however, held not only that terminating an employee because of her absence on leave resulting from her pregnancy was not a *per se*

violation of the PDA, but also that these facts did not constitute direct evidence of discrimination under the PDA, making *Thurston* inapplicable. Instead, the court applied the *McDonnell Douglas/Burdine* analysis and concluded that Ms. Rhett's absence, even though caused by pregnancy, constituted a "legitimate, nondiscriminatory" reason for the termination.

The court below thereby made the same error as the district court originally did in *Thurston*: applying the *McDonnell Douglas/Burdine* approach, which is "designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence,'" to a case in which there *is* direct evidence of discrimination, *Thurston*, 469 U.S. at 121. In *Thurston* this Court recognized that a rule or practice is "discriminatory on its face" if an employment decision -- there the availability of transfer to flight engineer status -- "depends upon" a protected status or characteristic -- there, the employee's age. *Id.* Here, it is equally undeniable that when Carnegie selected Deborah Rhett for termination because of her absence from the workplace *even though that absence resulted from her pregnancy*, it made the termination decision "depend upon" pregnancy. Hence, as in *Thurston*, there is "direct evidence" of discrimination that the courts below did not credit.

The issue of what constitutes direct evidence of discrimination is one of great importance. The practical consequence of applying one or the other evidentiary rules to a case is vividly illustrated by the present matter. If *Thurston* governs, then the burden of proof shifts to the employer to demonstrate that it had an affirmative defense or that there was a valid reason for terminating the petitioner even if no consideration is given to her pregnancy or pregnancy leave. 469 U.S. at 121-25. If the *McDonnell Douglas/Burdine* paradigm governs, the burden

that the reason proffered was pretextual and that the real reason for the termination decision was intentional discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

Obviously, a formal, written policy that is discriminatory on its face is direct evidence of discrimination. *Thurston*, 469 U.S. at 121 (policy conditioning transfer rights on age of pilots is discriminatory on its face). Similarly, discriminatory remarks made by a supervisor or other official responsible for the employment decision at issue have been held to constitute direct evidence of discrimination, making *McDonnell Douglas/Burdine* inapplicable. *See, e.g., EEOC v. Alton Packaging Corp.*, 901 F.2d 920 (11th Cir. 1990); *Lowe v. City of Monrovia*, 775 F.2d 998, *as amended*, 784 F.2d 1407 (9th Cir. 1986). *But see Ramsey v. City & County of Denver*, 907 F.2d 1004 (10th Cir. 1990) (comments must establish an existing policy of discriminatory treatment, not personal bias of supervisor or official, in order to be direct evidence of discrimination; otherwise, proof only permits trier to draw *McDonnell Douglas* inference of discrimination), *cert. denied*, 506 U.S. 907 (1992). This case presents the issue of whether an employment decision based on conduct or a characteristic inherently linked to protected group status under anti-discrimination law, such as absence due to pregnancy, constitutes direct evidence of discrimination. This is a question that this Court has not previously addressed and that should be resolved for the guidance of the lower courts.

2. Once having incorrectly determined to analyze the record according to the principles of *McDonnell Douglas* and *Burdine*, the court of appeals compounded its error by holding that Carnegie sufficiently met its burden of production in response to petitioner's *prima facie* case

(see *supra* note 6) by articulating -- as its "legitimate, nondiscriminatory reason" for her termination -- her absence from work (while on pregnancy leave). Wholly apart from the question whether that basis for selecting which employee will be terminated was "discriminatory on its face," it is readily apparent that using absence from the jobsite as the criterion for termination would necessarily affect pregnant (or post-partum) employees more severely than employees who were not pregnant. The reason articulated by the employer, Carnegie, was thus inherently *not* "nondiscriminatory," because it had the effect of selecting the petitioner as the one to be terminated because she belonged to a protected group. *See, e.g., Griffin v. Carlin*, 755 F.2d 1516, 1526-28 (11th Cir. 1985); *Segar v. Smith*, 738 F.2d 1249, 1268-70 (D.C. Cir. 1984) (proof of intentional discrimination cannot be overcome by reliance on an employment practice that has a disparate impact upon protected group), *cert. denied sub nom. Meese v. Segar*, 471 U.S. 1115 (1985).

Whether an employer may meet its burden of production by relying upon a practice neutral on its face (in the sense that it does not overtly and explicitly identify status as a member of a group protected by anti-discrimination laws as the criterion for being affected by an adverse employment action), but discriminatory in its disproportionate application to employees within protected classes, is an important issue in the enforcement of the anti-discrimination laws that is unresolved by decisions of this Court.[12]

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[12]*Compare Foster v. Dalton*, 71 F.3d 52, 55, 57 (1st Cir. 1995) (employer met production burden after plaintiff established *prima facie* case "by proffering a nondiscriminatory, if unsavory, reason for the personnel action: preselection of a friend of the appointing officer"; plaintiff did not "show that cronyism, when practiced in a particular workplace, regularly yields a racially discriminatory result")

3. Finally, as a result of the improper application of this Court's precedents as outlined above, the court of appeals reached the question whether, analyzing the record under *McDonnell Douglas/Burdine*, petitioner proved that the assertedly "legitimate, nondiscriminatory reason" was pretextual. Here again, the court of appeals' cramped reading of the two clauses of the PDA caused it to announce an evidentiary principle in conflict with the governing decisions of this Court (App. 13a-15a):

> Rhett has not made a showing that Carnegie treated her differently than it would have treated a non-pregnant employee absent on disability leave. . . . Thus, we must affirm the district court's denial of her PDA claim for the reasons indicated.
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> * * *
>
> In view of our analysis, we conclude that although the bankruptcy and district courts erred in finding that Rhett did not make out a *prima facie* case of pregnancy discrimination (because they did not apply the *Armbruster* reduction in force analytical framework), the error was harmless. Carnegie asserted a legitimate non-discriminatory reason for Rhett's termination, that she was away on leave. Rhett has not satisfied her burden of showing that this reason was pretextual. Therefore, we will affirm insofar as this case involves the termination of Rhett's position.

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with Hogan v. Pierce, 31 Fair Empl. Prac. Cas. (BNA) 115, 126-27 (D.D.C. 1983) ("when the federal government is involved, deviation from legally mandated civil service procedures and requirements cannot form the basis of a legitimate, lawful explanation sufficient to overcome a *prima facie* case of discrimination"; alternatively, while "the reasons given for the non-selection of [plaintiff] may have met the *Burdine* standards of articulating a legitimate and lawful non-discriminatory reason[], the Court holds that they were pretexts for discrimination").

This Court has consistently held that the trier of fact should consider any evidence introduced by a petitioner to demonstrate pretext, rather than looking for some talismanic showing of a particular kind. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519 (1993) ("*McDonnell Douglas* methodology was '"never intended to be rigid, mechanized, or ritualistic"'"); *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88 (1989) ("petitioner is not limited to presenting evidence of a certain type"); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983); *Furnco Construction Corp. v. Waters*, 483 U.S. 567, 577 (1978). The ruling below demonstrates that the point has still not been clearly understood. The Court should grant review in order to clarify and underscore its importance.

CONCLUSION

This Court granted certiorari in *Newport News Shipbuilding & Dry Dock Co. v. EEOC* because the case presented an "important question" involving the interpretation of the Pregnancy Discrimination Act that "had been decided differently" by the circuits. 462 U.S. at 675. The present case involves equally important questions concerning which there is conflict and confusion among the circuits. It provides the opportunity for the Court to give needed guidance to the lower federal courts in the application of an act affecting the rights of millions of employees whose absences from work are inherent characteristics of their pregnancies.

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,

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